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# Tinkering with Success: College Athletes, Social Media and the First Amendment

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# **Tinkering with Success: College Athletes, Social Media and the First Amendment**

**Meg Penrose\***

Good law does not always make good policy. This article seeks to provide a legal assessment, not a policy directive. The policy choices made by individual institutions and athletic departments should be guided by law, but absolutely left to institutional discretion. Many articles written on college student-athletes' social media usage attempt to urge policy directives clothed in constitutional analysis.

In this author's opinion, these articles have lost perspective – constitutional perspective. This article seeks primarily to provide a legal and constitutional assessment so that schools and their athletic departments will have ample information to then make their own policy choices.

## **I. Introductory Perspective – To Implicate Is Not to Violate**

Just because a regulation implicates the First Amendment does not mean that regulation violates the First Amendment.<sup>1</sup> In fact, many of the existing limits, and even season-long bans, placed on college athletes' social media usage are likely

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1. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 803-04 (1984).

constitutional.<sup>2</sup> Do these regulations implicate the First Amendment? Absolutely. But, do they violate the First Amendment? Most likely not when a proper content-neutral time, place and manner assessment is applied.<sup>3</sup> Accepting this conclusion requires a deeper appreciation and understanding of the First Amendment, particularly in the unique context of college athletics.<sup>4</sup> In candor, accepting this conclusion requires perspective.

When discussing the issue of a college student-athlete's First Amendment rights, it is imperative to appreciate perspective. Many commentators decry any regulations on a student-athlete's speech because they fail to appreciate that the goal of athletics is successful athletic performance. These authors admonish schools and coaches, claiming that they should be educating their athletes on the proper use and handling of social media. In essence, these authors would prefer to have coaches teach their athletes on the finer points of social media, something many coaches are ill-equipped to do, despite the fact that such lessons take away from the focus on training athletes to excel *on the court or on the field* where the focus truly is succeeding in sporting events. In reality, this perspective asks coaches to "take their eye off the ball." Instead of discussing

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2. See Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509 (2013).

3. See *infra* Part IV. See also *Cox v. New Hampshire*, 312 U.S. 569 (1941).

4. See, e.g., *Marcum v. Dahl*, 658 F.2d 731, 734-35 (10th Cir. 1981) (dismissing University of Oklahoma women's basketball players' First Amendment challenge to the loss of their respective scholarships for criticizing the head coach); *Williams v. Eaton*, 468 F.2d 1079, 1082 (10th Cir. 1972) (permitting dismissal of several University of Wyoming football team members from the team after a dispute regarding the attempt by these team members to wear black armbands during a game with Brigham Young University to protest racial policies of the Mormon Church); *Green v. Sandy*, No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at \*16 (E.D. Ky. Oct. 3, 2011) (finding no violation of a player's First Amendment right and dismissing the player from the soccer team for criticizing the women's soccer coach); *Richard v. Perkins*, 373 F. Supp. 2d 1211, 1219 (D. Kan. 2005) (finding no First Amendment violation when the track coach dismissed an athlete from the team and no "constitutionally protected property or liberty interests in participating in intercollegiate athletics.").

offense, defense and strategy, many of these authors believe – erroneously – that coaches should be instructing on social media etiquette.

This “educational” approach ignores the proper role of coaches – which is to field a winning team and prepare their athletes for fair and successful competition.<sup>5</sup> The primary goal of college athletics, actually all athletic pursuits, is successful athletic performance. No one shows up to a game or tournament hoping or preparing to lose. No athlete suits up hoping to perform in mediocre fashion. Athletics, by its very nature, separates teams and individual athletes into winners and losers. All the hard work, sacrifice and training is endured to claim victory, not defeat.

Articulating this primary goal of successful athletic performance does not, however, minimize or discount the importance of ensuring, at all times and in all ways, student-welfare.<sup>6</sup> Coaches have a continuing duty to protect their athletes and to preserve their physical, mental and emotional well-being. This entire article *assumes* that college coaches and university personnel put student welfare before winning or any other issue relating to athletic performance. Student welfare is

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5. See *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) (upholding dismissal of college basketball coach for using the “N-word” during a locker-room speech to allegedly motivate his players). In denying that Dambrot had any First Amendment or academic freedom protection afforded college faculty in the classroom, the Sixth Circuit explained, “Dambrot’s use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher. Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot’s role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach’s will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach’s ideas which might have taken place.” *Id.*

6. In fact, student welfare may present an entirely separate and independent basis for imposing time, place and manner regulations on student-athletes’ use of social media, including season long bans. Because the issue of student welfare is enveloped in the current thesis (emphasizing winning as the primary goal of athletics presumes student-welfare has been preserved in the process), the author will save for another day a longer, more extensive treatment of student welfare as an independent basis for supporting time, place and manner restrictions on student-athletes’ social media usage.

a principal goal of the entire NCAA structure,<sup>7</sup> which limits practice time and seeks to ensure that an athlete receives dual protection in their varying roles as a student and an athlete.<sup>8</sup> The packaging of this legal argument assumes, *always*, that successful athletic performance is being achieved – or targeted – only in a manner that protects student welfare and an athlete’s well-being.<sup>9</sup> The student-athlete’s physical and emotional welfare is the paramount concern, or should be, of every athletic department. Thus, this article takes as a given that student welfare and protection will always precede decisions, both on and off the court, that impact a student athlete.

Accepting that successful athletic performance can be accomplished without sacrificing student welfare and well-being, one returns to the primary goal of college athletics. No school seeks to field a losing team, and few fans enjoy following

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7. See Nat’l Collegiate Athletic Ass’n, 2013-2014, NCAA DIVISION I MANUAL, CONST. art. 2.2, 3 (2013), *available at* <http://www.ncaapublications.com/productdownloads/D114.pdf>.

8. *Id.* at 3. “2.2.3 Health and Safety. It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes. (*Adopted: 1/10/95*)); and] 2.2.4 Student-Athlete/Coach Relationship. It is the responsibility of each member institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach. (*Adopted: 1/10/95*).” *Id.*

9. *Id.* at 4.

2.2.4 The Principle of Sportsmanship and Ethical Conduct, For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program. It is the responsibility of each institution to: (*Revised: 1/9/96*) (a) Establish policies for sportsmanship and ethical conduct in intercollegiate athletics consistent with the educational mission and goals of the institution; and (*Adopted: 1/9/96*)[,] (b) Educate, on a continuing basis, all constituencies about the policies in Constitution 2.4-(a). (*Adopted: 1/9/96*)[.]

*Id.*

marginally competitive teams.<sup>10</sup> America loves winners. And, Americans love their college athletes.<sup>11</sup> But, as we enter the realm of athletic speech, it becomes critical to honestly embrace each of our perspectives to fully appreciate our respective constitutional biases.

If an individual argues for the so-called rights of college athletes to use social media without regulation, is she espousing that “right” for their benefit or hers? Does that individual really want her favorite athlete to be tweeting about his or her college experience while she is preparing for an important game or tournament? And, are they following the student-athlete in their student capacities (craving information about their classwork, their laboratories, their thesis and writing or a change in major) or wanting to hear about the exploits of an 18- to 23-year-old living the athletic dream of playing football for Texas A&M or Notre Dame or playing basketball for Duke or Kansas? The truth is probably that most fans, a term derived from the word “fanatic,” are far more interested in the college athlete’s life as an athlete, with little to no interest in their educational pursuits.<sup>12</sup> Ours is quickly becoming a TMZ-focused

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10. Blair Browning & Jimmy Sanderson, *The Positives and Negatives of Twitter: Exploring How Student Athletes Use Twitter and Respond to Critical Tweets*, 5 INT’L J. SPORTS COMM. 503, 506 (2012). “For many people, sports fandom is a significant component of their social identity (Trujillo & Krizek, 1994; Wann, Royalty, & Roberts, 2000). This identity, grounded in attachments to teams and athletes, can provoke maladaptive behaviors (Wakefield & Wann, 2006), particularly if athletes or teams do not meet fans’ expectations.” *Id.*

11. *Id.* “One reason for Twitter’s popularity is the increased access it gives fans to athletes and sports figures (Sanderson, 2011a, 2013). While this enhanced immediacy can be positive, it brings with it problems, particularly for student-athletes.” *Id.*

12. *Cf.*, Bruce Feldman, *Social-Media Savvy Grows, Even as Coaches, Schools Try to Keep Up*, CBSSPORTS.COM (Mar. 13, 2012, 4:29 PM), <http://www.cbssports.com/collegefootball/story/17771677/socialmedia-savvy-grows-even-as-coaches-schools-try-to-keep-up>. Feldman aptly describes the problem:

The level of celebrity for college athletes has never extended further than it does these days. The reason? Start with significantly more TV coverage and 24-hour, wall-to-wall media while the definition of “media” continues to morph into something much different in recent years, mirroring the often-contorted modern-day definition of celebrity. In

society, one that relishes the next outrageous story involving an athlete or entertainer.

For those schooled in constitutional rights, it should be clear that student-athletes are far more regulated than their traditional college counterparts.<sup>13</sup> Student-athletes wear two separate hats – one as a student, where robust First Amendment rights remain,<sup>14</sup> and another as an athlete, where speech and expression rights have long been regulated by coaches, athletic departments and even athletic conferences. Courts analyzing social media regulations on college-athletes will likely appreciate these distinctions as they have in the past.<sup>15</sup> And, if coaches and athletic programs continue to impose time, place and manner regulations (such as no Facebook or Twitter during season or before, after and during athletic contests) that are content-neutral, these regulations are far more likely to pass constitutional muster than those that target particular words and phrases using policing software programs, as content-based regulations receive higher constitutional scrutiny. Further, recent legislative attempts to prevent coaches or other school officials from monitoring their student-athletes' social media, while passed with good intentions, actually forces programs to choose either to ban or limit their athletes' social media usage under time, place and manner analysis, or forego any regulation

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football, kids become commodities and get famous before they sign with a college as worshipping fan bases and obsessed media hang on their every move. Add in a level of unprecedented accessibility to these players and it's a combustible mix.

*Id.*

13. See *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007) (noting the well-established fact that "student athletes are subject to more restrictions than the student body at large. . .").

14. *Cf.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The Supreme Court helped explain this distinction somewhat in a different context in *Keyishian*: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, 52 F. Supp. 362, 372." *Id.* at 603.

15. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 658 (Cal. 1994) (noting that intercollegiate athletes are subjected to "special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests . . . not shared by other students or the population at large.").

and risk team disruption or athletic fallout from errant social media postings.<sup>16</sup> Coaches literally must decide how important Facebook and Twitter are in relation to athletic performance.

Just because a regulation implicates the First Amendment does not mean that regulation violates the First Amendment.<sup>17</sup> As the Supreme Court observed in *City Council of Los Angeles v. Taxpayers for Vincent*, even complete bans on speech may be constitutionally permissible.<sup>18</sup> Writing for the Court, Justice Stevens reminded:

The ordinance prohibits appellees from communicating with the public in a certain manner, and presumably diminishes the total quantity of their communication in the City. The application of the ordinance to appellees' expressive activities surely raises the question whether the ordinance abridges their "freedom of speech" within the meaning of the First Amendment, and appellees certainly have standing to challenge the application of the ordinance to their own expressive activities. "But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *Metromedia, Inc. v. San Diego*, 453 U.S. at 561 (Burger C. J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of

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16. See, e.g., Pam Greenberg, *Employer Access to Social Media Usernames and Passwords*, NAT. CONF. OF ST. LEGISLATURES (Jan. 17, 2013), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx> (listing six states that have enacted legislation and fourteen states that have introduced legislation restricting employers or educators from requesting access to social networking sites of employees and students). See also CAL. EDUC. CODE §§ 99120–22 (Deering 2012) (prohibiting educational institutions in California from requesting access to student social media accounts, asking for associated usernames or passwords, giving information from such networks, or punishing students for failing to give such information, if asked).

17. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803-04 (1984).

18. *Id.*



speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. *Schenck v. United States*, 249 U. S. 47, 52 (1919).<sup>19</sup>

The failure of many fans, and even scholars, to appreciate this distinction is understandable. But, my guess is that the many voices claiming social media regulations on college athletes “violate” the First Amendment are based on perspective – their perspectives – which may not always be a proper legal, much less constitutionally-supported, perspective. Of course the fan wants greater access to the athlete and the locker room. The fan wants to be in the athlete’s head when he faces that last second field goal or she is at the free-throw line with the game on the line. The fan wants to know, “What are they thinking? What motivates them?” But, the Constitution does not necessarily require that a coach permit such unfettered access.

The coach’s job is to train that student-athlete to make the field goal and convert those free-throws. The coach’s job is to provide opportunities for the student athlete to excel athletically. In contrast, the teacher’s job is to educate. And, while coaches teach important life skills, my sense is that courts will not impose on coaches the line of cases focused on classroom speech and expression but rather will analyze the issue of purely athletic speech through the lens of sport where athletic performance is the primary focus. Successful athletic performance – at least for the coach and athlete – is probably more important than robust First Amendment rights in a locker room on or the pitch. To the athlete, athletic success is more important than unfettered Facebook or Twitter access. Or, at least this is the preference demonstrated by most college athletes.<sup>20</sup>

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19. *Id.*

20. Chris Fuhrmeister, *Clemson Bans Football Players From Twitter (And Players Don’t Mind)*, SB NATION, (Aug. 1, 2013 4:36 PM), <http://www.sbnation.com/college-football/2013/8/1/4579944/clemson-football-players-twitter>. Apparently, Clemson – like many other programs – chose to ban Twitter during season to enable its players to focus on football. As the athletes signed off from Twitter, many appreciated it was time to get down to the business of football. Representative tweets include: “Alright twitter, time

## II. Further Perspective – First Amendment Lawyer, Former College Athlete

I am a former Division I college athlete. In fact, I left college with absolutely no debt because my athletic skills, though far exceeded by my college teammates, enabled me to obtain five years of fully-funded educational opportunity. For four years, I played guard on the Women's Basketball team. I rarely started and was far from an extraordinary college athlete. My coach once remarked she wished she could put my "heart and desire into one of [her] more talented athletes." This is what many consider a back-handed compliment. Knowing my coach, she meant exactly what she said, but meant absolutely no disrespect. She spoke the truth. Her comment gave me perspective, important perspective – I had reached my athletic pinnacle, at least in basketball, in high school.

Following my fourth year as a player, I was privileged to stay on as a Graduate Assistant Coach for the Women's Basketball team. This experience gave me further, but very different, perspective. Not only was I able to experience Division I athletics and all that it entails as a player, but I was also given a small glimpse into the many issues facing coaches whose careers literally hang on the judgment of 18- to 23-year-olds, many of whom are living away from home for the first time. Coaching is not nearly as glamorous as it appears.

Playing college athletics was exhilarating, culminating a young life spent practicing and preparing for Division I competition. Prior to age 22, everything in my life centered on basketball and athletics. If I was not practicing, training, running or studying basketball, I was dreaming of my opportunity to take that last second shot, make that last free

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to do work. I'll be back in January." *Id.* (quoting tweet from Chandler Catanzaro); "It's time to hop in the football season submarine. See you next year." *Id.* (quoting tweet from Ronnie Geohaghan Jr.); "Alright twitter it's been real. Time to get this job. Next thing I tweet will be after the BCS championship[.]" *Id.* (quoting tweet from Jordan Legget); and, "Because we are all in[.]" *Id.* (quoting tweet from D. O'Daniel). College athletes, whose conduct has been strictly regulated since childhood, appreciate that coaches have rules that help players focus on their sport. Twitter bans appear to fall in this realm, at least for athletes.

throw. Playing was about performing and succeeding on the court. Coaching, in contrast, showed me how often the judgment of 18- to 23-year-olds is colored by their limited life experience. If athletic performance and success is all that matters to an 18- to 23-year-old, that individual most likely lacks perspective. I know I did. I know my teammates did. I know my sister, who played Division I volleyball, did. I know my brothers-in-law, who played Division I basketball and football, did. We all did, until we spent time coaching.

Coaching gives an entirely different perspective. Coaching focuses on team first, individual second. Coaching emphasizes team performance and ensuring that team chemistry remains viable and effective. The goal of a coach is to keep several individuals with vastly different personalities focused on a unitary goal – winning. The goal of a player is, in contrast and generally speaking, to further their individual talents in a particular athletic endeavor. The goals of coaches and players overlap, but they are not identical. The perspective of coaches and their athletes, likewise, are often worlds apart.

Another perspective that is increasingly being expressed is the fan's perspective. Twenty-first century fans seek, if not demand, greater and greater access to their favorite players. Social media, be it Facebook, Twitter, Instagram, or Pinterest, enables fans to gain immediate access to their favorite players to support, taunt, laud or criticize them. And, in a culture where athletes are some of the most revered individuals in society, such access is highly desired. TMZ and social media have blurred the fan's perspective from simply rooting for his or her favorite team into demanding greater access into their favorite player's world – the world of an 18- to 23-year-old college student. Thus, it is not uncommon in my experience to see fans raise First Amendment concerns on the behalf of college athletes when those fans want unlimited 24/7 access to their favorite player. "It is *their* right," has become a common refrain of fans.

While I am a fan, I am also a fan that appreciates and studies the law. And, my legal education has given me yet another, distinct perspective. When I completed college, my lack of debt enabled me to attend graduate school. I still consider my five years of paid education the greatest perk of having played

college basketball. Having learned discipline, dedication and perseverance during athletics, law school became a natural fit. Reading cases for hours, studying legal theory, appreciating the limits of government and law, I came to appreciate that the law is not nearly as neat or as clean as many perceive. Law is as complicated as any offensive or defensive scheme known in athletics. Law is as fluid as any athletic contest with stakes often higher than playing for a national championship. The law is amazing but its proper application requires perspective. So, I learned. I studied. As an athlete I was trained to win and always eager to compete. So, I competed. I trained my mind. I looked at all angles of the law tirelessly. I refused to quit. And, ultimately, I excelled, due largely to the lessons taught during athletic competition. The tenacity I exerted in law school had been honed many years before in athletics.

Eventually, I became a law professor. I continue to train my mind, learning and studying, all the while gaining additional perspective as a teacher of law. Every day, I am coaching the brightest and most talented individuals to become lawyers – to “succeed” at law school to “perform” as lawyers. I try to build character. I try to instill discipline, focus and, yes, even teamwork. Law, much like athletics, requires collaboration to successfully perform. And, law, much like athletics, is usually about winning.

This article seeks to offer my legal perspective on the intersection of college athletes, social media and the First Amendment. I gained this perspective having played athletics, having coached athletes, and having taught and continuing to teach law students. My legal perspective may not be popular among fans, deferring to coaches and athletic departments in their goal to train athletes to be good citizens and effective players. My legal assessment grants coaches and athletic departments more latitude to decide what, if any, limits should be placed on their student-athletes’ social media usage. The policy choice, under my legal analysis, is left to coaches and institutions even as fans champion their favorite college athletes’ First Amendment rights.

My perspective is undoubtedly colored by my training as an athlete, my brief experience as a coach, and my nearly two

decades spent as a lawyer and, ultimately, a law professor. You may not agree with me. You may not embrace what I have to say. But, my comments should be kept in their proper perspective. I am not arguing policy. I am not favoring a particular choice that should be made. I am analyzing law.

I was an athlete first. I have experienced life at the Division I level being placed under a coach's restrictions. I have endured playing, losing, winning, taunting, cheering, advising and endless coaching. I have seen this issue from inside – which gives me a unique perspective – one, unfortunately, shared by very few fans and even fewer judges.

To me, the question of social media usage is not merely theoretical. The issue is both pragmatic and personal. Are fans really in the best position to argue for the free speech rights of their favorite athletes? And, in doing so, are these fans really doing the athletes a favor or a disservice? Most importantly, are fans urging these “rights” to serve the best interests of the athletes or themselves?

Many, many blogs and articles boldly proclaim that social media bans violate a college athlete's First Amendment rights.<sup>21</sup> As Lee Corso has so often admonished, “[n]ot so fast my friend.” True, the First Amendment is often *implicated* by restrictions on speech. But, implicating the First Amendment is not the same as violating the First Amendment.<sup>22</sup> And, as I continue to assert, coaches and athletic departments likely have the legal – no, the Constitutional – right to limit their athletes' access to social media. You have the First Amendment right to disagree with my conclusions. I hope as you do so, you will consider the influences of your own training, your own experiences and your own perspective. Are you a former college athlete? Are you an attorney, with an emphasis in First Amendment? Or, are you a fan – someone interested in getting to know your favorite college athlete better through social media? Your perspective, like

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21. See, e.g., J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. STATE L. REV. 781 (2012). See also, Eric Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices*, 38 J. COLL. & UNIV. L. 451 (2012).

22. *Taxpayers for Vincent*, 466 U.S. at 803-04.

mine, probably colors your opinion.

Athletes are trained to focus on successful athletic performance and the discipline it takes to win. We are taught to sacrifice for the sake of the team, the university. Athletes have given years to training, made sacrifices, and have endured rules and regulations that may seem odd to those outside athletics. But, athletes willingly forgo a traditional college experience for the amazing opportunity to compete and represent an institution's athletic department. Athletes are taught to keep our focus – on and off the court, on and off the field. We often do things that are uncomfortable for others and do so knowing that our team, and university, will benefit from our sacrifices.

Athletics is, in the end, truly about successful performance. And, while we expect our coaches to train athletes how to be good citizens, not merely good players, coaches, players and teams are judged by their performances, not their speech or expressive activity. The omnipresent nature of social media undoubtedly complicates this equation.<sup>23</sup> The First Amendment does not. Coaches have the constitutional right to limit their athletes' speech and do so on a regular basis. This is nothing new. This is nothing remarkable. And, it is certainly nothing that has historically been seen as violating the First Amendment.

Does a coach's decision to limit his or her student-athlete's access to social media implicate the First Amendment? Yes, it does. But that is not the ultimate question. Rather, the question is whether such limits violate the First Amendment. Contrary to many other commentators, I believe these limits – regardless of their wisdom from a policy perspective – are constitutional content-neutral limitations permitted under reasonable time, place and manner restrictions.

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23. See, e.g., Adam Hughes, *Purdue Basketball Twitter Ban: Fan Reaction*, YAHOO! SPORTS (Oct. 17, 2011), <http://sports.yahoo.com/top/news?slug=ycn-10229161>. As Hughes explains: "While fans may enjoy [the athletes'] antics, they do little to shed a flattering light on a university or its programs, so it's not hard to understand [the coach's] hesitancy to let his players hit the Web. Add in the fact that these are young men who don't always show the best judgment, and it's not far-fetched to imagine one or more of them revealing some tidbit or other that would amount to a tactical advantage for their opponents . . ." *Id.*

### III. The Important Perspective – The Heavily Regulated World of College Athletics

College athletes are generally the most regulated students on campus.<sup>24</sup> Athletes often are required to report to campus long before classes begin, must pass a physical in order to enroll in an athletics class, and often must maintain a particular grade point average to remain on the team.<sup>25</sup> They must attend study hall, have access to unique tutors and tutoring<sup>26</sup> and find themselves traveling the country, if not the world, in pursuit of athletic competition.<sup>27</sup> Some of the regulations imposed on athletes come directly from the NCAA, including requirements that an athlete maintain a continued level of progress toward a degree, while others come directly from the athletic department or a coach.<sup>28</sup> But, college athletes face a myriad of regulations that more traditional college students do not.

Many college athletes are prohibited from smoking, drinking (even if legally of age), staying out all night, going home during Thanksgiving, Christmas or spring break.<sup>29</sup> The

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24. See *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007).

25. See, Jeff Stone, *A Hidden Toxicity in the Term "Student-Athlete": Stereotype Threat for Athletes in the College Classroom*, 2 LAW & POL'Y J. 179, 179 (2012) (observing that NCAA regulations mandate college athletes "enroll in at least twelve semester units, declare a major, maintain a cumulative grade-point-average of 1.8 or higher, and make academic progress toward a degree."). *Id.*

26. *The Value of College Sports*, NCAA.ORG, <http://www.ncaa.org/student-athletes/value-college-sports> (last visited Apr. 12, 2015) (explaining that college athletes "receive academic support, such as state-of-the-art technology and tutoring, and have access to athlete-focused academic advisors in addition to traditional academic advisors.").

27. See e.g., Michael Braun, *Finding A Balance: College Student Athletes*, HASHTAGS (April 23, 2013), <http://sites.jmu.edu/103molloy/finding-a-balance-college-student-athletes/> (describing the differing experiences of four interviewed college athletes).

28. *Student-Athletes: Dress Code*, in SOUTH CAROLINA STUDENT-ATHLETE CODE OF CONDUCT HANDBOOK. When traveling, male members of the South Carolina athletic program are to "refrain from wearing earrings" and female athletes are expected to "wear a dress, skirt, or dress slacks." These regulations are based on the fact that "[s]tudent-athletes are public representatives of the University of South Carolina both on and off the field."

29. See, e.g., *University of Delaware Student-Athlete Code of Conduct Form*, in UNIVERSITY OF DELAWARE STUDENT-ATHLETE CODE OF CONDUCT

traditional college experience is not one shared by the college athlete. College athletes are randomly subjected to drug tests.<sup>30</sup> College students, unfortunately, often experiment with drugs and, unless arrested, face no consequences for doing so. A college athlete's career could end, and scholarship withdrawn, with such experimentation. College athletes are often required to submit attendance reports to coaches or tutors while their more traditional college roommate sleeps the day away. College athletes are often required to attend team meetings, study film and avoid classes that conflict with their practice or game schedules.<sup>31</sup> Their majors may be impacted by their sport and their sport's travel schedule. College athletes may be expected to take summer school and winter intercession classes to open up their academic schedule for more early morning workouts or game-related travel.<sup>32</sup> The schedules of college athletes are not theirs to choose. Rather, that schedule is influenced, if not chosen, by someone else whose focus is on the unique demands of college studies on the student-athlete.<sup>33</sup>

Thus, the life of a college athlete is heavily regulated. Athletes both expect and accept this fact. Fans, unfamiliar with

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HANDBOOK (requiring athlete signature) (proscribing "[t]he use and possession of drugs, tobacco, alcohol . . . are strictly prohibited while an individual is a student-athlete at UD").

30. One of the more recent examples occurred in the first NCAA College Football National Championship game in January, 2015. One of Oregon University's wide receivers, Darren Carrington, was disqualified from participating in the national championship game due to failing an NCAA-sanctioned drug test. ESPN indicated that multiple reports confirm Carrington tested positive for marijuana. Unlike traditional college students who are not subjected to random drug tests, college athletes can lose numerous benefits, and face athletic sanctions, under such mandatory, randomly administered tests. See Brett McMurphy, *Darren Carrington Ruled Ineligible*, ESPN (Jan. 10, 2015), [http://espn.go.com/college-football/bowls14/story/\\_/id/12145339/darren-carrington-oregon-ducks-ineligible-national-championship-mark-helfrich-says](http://espn.go.com/college-football/bowls14/story/_/id/12145339/darren-carrington-oregon-ducks-ineligible-national-championship-mark-helfrich-says).

31. Madelaine Jerousek-Smith, *Remarkable Students, Remarkable Athletes*, 50 Parent Times Online 2 (2006).

32. *Id.*

33. Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L. REV. 329, 338 (1996) (contending that "some [student-athletes] will never look over course descriptions or educational requirements. Rather, academic course loads and concentrations of study are determined by assistant coaches in charge of academics.").



the demands of Division I competition, may properly think that time spent off the court or away from the field should be entirely the student athlete's time. But, that impression is a far cry from an athlete's reality. College athletes have schedules that are far from their own – often including team meals, NCAA required training sessions, volunteer activities required by the team or athletic department.

Athletes learn at a very early age that weekends are spent in competition and weekdays are spent practicing. Those that want to blend in with the general population often find themselves blending right out of college athletics. Division I athletes must be disciplined, regimented and willing to sacrifice for their team and sport. I do not say this as a dictatorial mandate but rather as a fact of what is required to succeed and play at the highest level. Athletes accept they will surrender part of their college experience in exchange for participating on a team. Athletes expect to be given a list of "team rules." The inclusion of rules relating to speech and conduct are something that the athlete will have faced many, many times before – from penalties for taunting and excessive celebration to personal fouls for cursing or inappropriate language. Athletes live in a world that is heavily structured and regulated from day one, beginning at the earliest age. The Constitutional equation assessing the First Amendment rights of college athletes, similar to those addressing search and seizure, will undoubtedly turn on this heavily regulated atmosphere.

If existing case law serves as a harbinger in this area, the Constitution will tolerate more regulation of a college athlete than a traditional college student.<sup>34</sup> Athletes are, quite literally, special and different. While many focus on the regulations imposed upon athletes, one must not forget the many perks that flow directly to athletes as a result of their participation. For every Thanksgiving dinner I missed in college due to playing in a basketball tournament, I received the opportunity to travel

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34. See, e.g., *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (observing that "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team" permit greater limitation on a student-athlete's First Amendment rights).

this amazing country – from Manhattan, Kansas, to Manhattan, New York. For every Christmas or winter break that I was on campus alone with my teammates working toward a winning season, I was rewarded with funds for my books, labs and tuition. We were in our dorms and apartments studying offenses and defenses in our school-issued gear, wearing top-of-the-line shoes, while our colleagues were out drinking and watching movies. I watched film, studying offenses and defenses, then walked to study hall where I refocused on Edgar Allen Poe, Nathaniel Hawthorne and English History. I had early morning practice, class, then more practice. But, I was well-fed, well-traveled and well-regarded. I was a student-athlete but my roles as student and athlete were always distinct and distinguishable.

At practice I was an athlete, expected to focus my time and talents on basketball. In the classroom I was a student, expected to appreciate the finer points of mathematical equations or governmental structures. I passed balls to my teammates as an athlete and passed exams in class as a student. The verbs may be the same, but the law should not treat these experiences as equivalent in any regard. The athlete's role and rights are distinct from the student's.

As an athlete, I learned lessons that transcended the classrooms of my incredible professors. I learned to sacrifice self for others so that our team could collectively pursue victory. I learned to work with people on the court that I avoided off the court because we shared a common goal. They were my teammates and we fought together. I learned the harder you work, the more you sacrifice, the more you can achieve. My life was bound up in basketball more than any other part of the college experience. And, this was at a smaller Division I college – not a Texas A&M, Notre Dame, Duke or Kansas.

The truth is college athletes are special and different. As student-athletes they have special tutors, special dining halls and team meals, special travel, special gear unique to each athletic team, special facilities and quiet study places for athletes only, special nutritional and training opportunities. Thus, it should not at all be controversial that the law would treat these individuals in a special and different manner.

Coaches understandably seek to limit their athletes' social

media usage because the light shines far brighter on the college athlete than the traditional college student.<sup>35</sup> If a regular student makes a racist or homophobic comment, chances are it will not make the evening news, be reported perpetually on ESPN or announced nationally through USA Today. But, have a standout wide-receiver or a starting point guard make a boneheaded comment or give away information about their or a teammate's injury status and a team can find itself focusing on public relations issues rather than offense or defense.<sup>36</sup> One commentator even remarked the media waits, eagerly, for a

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35. Bob Wolfley, *After Loss to Badgers, Iowa's Zach McCabe Tweets His Anger, Prompting Fran McCaffery to Ban Twitter*, J. SENTINEL (Feb. 25, 2014), <http://www.jsonline.com/blogs/sports/247135701.html>. The Iowa Hawkeyes Men's Basketball team provides one such example. Following a tough loss on February 22nd, Zach McCabe lashed out on his Twitter account at 2:49 p.m. as follows: "The fact that I have iowa fans saying shit me (sic) is insane . . . You fans suck . . . Suck a fat one all of you." *Id.* (quoting tweet from Zach McCabe). As in nearly every other Twitter fiasco, the Tweet was immediately deleted (but not before several people captured screen shots to keep the tweet in perpetuity), McCabe cancelled his Twitter account and then his coach placed a Twitter ban on the entire team; *Iowa Coach McCaffery Tells Players to Get Off Twitter*, FOX SPORTS (Feb. 24, 2014), <http://msn.foxsports.com/college-basketball/story/iowa-fran-mccaffery-tells-players-to-get-off-twitter1-022414>. In a February 24, 2014, story on Fox Sports, the following story appeared:

Iowa coach Fran McCaffery has instructed the Hawkeyes to shut down their Twitter accounts for the rest of the season after senior Zach McCabe exchanged barbs with detractors on the social media service. McCabe air-balled a 3-pointer that could have tied the game with 16 seconds left against Wisconsin on Saturday. The 20th-ranked Hawkeyes went on to lose 79-74. McCabe responded to negative comments directed at him on Twitter by lashing out at his critics after the game. McCabe deleted the post and apologized. McCaffery says his overall impressions of social media are negative and that he'd prefer his players keep their focus on Iowa's upcoming games. He said his players are free to resume tweeting once the season is over.

*Id.*

Coach McCaffery's in-season ban is precisely the type of ban likely to pass constitutional muster. The point of this ban is directly related to his team's on-court success and is not based on particular viewpoint or content. All Twitter feeds will be banned. Thus, this and similar in-season bans should easily survive as a content-neutral time, place and manner restriction analysis.

36. See Hughes, *supra* note 23.

public debacle.<sup>37</sup> Unfettered social media usage lends itself to disrupting team chemistry and team performance.<sup>38</sup> And, as such disruption runs counter to the main goal of athletics – successful athletic performance – chances are that courts will provide coaches with greater latitude than traditional college professors.<sup>39</sup>

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37. Gregg Doyel, *Coaches' Twitter Ban Isn't Stunting Players, It's Protecting Them*, CBSSPORTS.COM (Aug. 9, 2011), <http://www.cbssports.com/columns/story/15416882> (In an incredibly candid moment, Doyle explained: "If a college athlete says the wrong thing on Twitter, people like me are going to hear about [it]. We're going to talk about it on the radio and write about it in the newspaper or on the Internet. By the time we're finished, the player's name will be in shambles and his coach will be performing damage control. As for us, we leave the wreckage in our rear-view and move on to the next guy.").

38. Dave Southorn, *Two Years Later, Petersen Happy with Twitter Ban*, IDAHO PRESS-TRIBUNE (Sept. 12, 2012, 12:39 PM), [http://www.idahopress.com/blogs/sports/dave/two-years-later-petersen-happy-with-twitter-ban/article\\_1f0dc592-fd09-11e1-9b5b-001a4bcf887a.html](http://www.idahopress.com/blogs/sports/dave/two-years-later-petersen-happy-with-twitter-ban/article_1f0dc592-fd09-11e1-9b5b-001a4bcf887a.html) (responding to questions about his decision to ban Twitter, Coach Peterson stated, "I'm glad we do it . . . It just serves no purpose, in my opinion, for what we're trying to do here. It's just distracting.").

*Id.* See also, Greg Wallace, *Clemson Twitter Ban Raises Questions of Education, Abuse*, ORANGE & WHITE (Aug. 10, 2012, 6:40 PM), <http://www.orangeandwhite.com/news/2012/aug/10/clemson-twitter-ban-raises-questions-education-abu/> ("Clemson coach Dabo Swinney says the ban is a matter of keeping his players' minds focused on the field."). Coach Swinney further underscored that "[Y]ou take an 18, 22 year old young person who's got 30,000 followers, and it's just one more distraction, one more thing, one more obligation . . . [and we're not going to participate in that throughout the season." Phil Chardis, *Men's Basketball Notes: Social Media Another Issue for Coaches*, JOURNALINQUIRER.COM (Jan. 7, 2011, 12:00 AM), [http://www.journalinquirer.com/sports/men-s-basketball-notes-social-media-another-issue-for-coaches/article\\_8a6e4e70-d915-5f1e-aa4a-16fb4dcd4abd.html](http://www.journalinquirer.com/sports/men-s-basketball-notes-social-media-another-issue-for-coaches/article_8a6e4e70-d915-5f1e-aa4a-16fb4dcd4abd.html). Coach Steve Lavin, like many other coaches who have banned social media, spoke of the distractions that social media causes as the rationale for his "during the season" ban. Heather Dinich, *Twitter Ban Good Move by Jimbo Fisher*, ESPN COLLEGE FOOTBALL (July 26, 2012, 2:00 PM), [http://espn.go.com/blog/acc/post/\\_id/41280/twitter-ban-good-move-by-jimbo-fisher](http://espn.go.com/blog/acc/post/_id/41280/twitter-ban-good-move-by-jimbo-fisher) (noting that Coach Fisher considers Twitter "clutter."). Fisher defends his policy by noting that, "[I]t's a lot easier when there are less distractions." *Id.* It is interesting to note that once Twitter was banned at Florida State, the team won a national championship one year later. Focus, it appears, may be relevant to athletic success.

39. Browning & Sanderson, *supra* note 10, at 509-11 (explaining the endemic, obsessive nature of Twitter among college athletes). Professors Browning and Sanderson spoke of athletes admitting they checked Twitter *during* games, despite rules barring such use and noted the image/logo issues

Equally problematic are the fragile egos and psyches of 18- to 23-year-old athletes. These individuals have sacrificed their entire lives to reach the college level and in an instant a hateful comment from someone outside the team, outside the program, can shred an athlete's confidence.<sup>40</sup> Tragically, there are so many examples they are difficult to catalogue.<sup>41</sup> But, Professors Browning and Sanderson do a nice job of summarizing the injury (and distraction) that Twitter causes on the emotional level for college athletes:

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that Twitter accounts encourage. *Id.* at 511. The pair detailed their empirical research as follows: "Participants reported having used Twitter for as little as 5 1/2 months and for as long as 4 years ( $M = 18$  months). They reported having Twitter followers ranging from as few as 100 to 18,263 ( $M = 3,207$ ). Participants reported checking Twitter frequently throughout the day, ranging from 20 to hundreds of times each day (these student-athletes shared that they configured Twitter to alert them each time they were mentioned or that they would simply look at their phone every few minutes). All student-athletes stated they accessed Twitter on their cellular phone due to convenience, and they stated that only in the rarest of cases would they access Twitter via a computer." *Id.* at 509. And, while the Browning & Sanderson study was limited to a small pool of student athletes, there is no reason to think that their findings diverge in any manner from other similarly situated college athletes.

40. *Id.* at 516 ("Student-athletes' being ripe candidates for criticism is nothing new, but two things that appear to be escalating are the boldness of the critics and the immediacy of their messages. Twitter's rise has been accompanied by what appears, at least anecdotally, to be a hypercritical society in which people seem to feel empowered to send very demeaning or condemning messages to student-athletes via Twitter. This brazen confidence stems from the protection users have behind the phone or computer screen. Indeed, while many users list their real names, plenty hide behind the security of anonymity when sending critical tweets.").

41. Cindy Boren, *Alabama-Auburn: Death Threats for Kicker After Classic Iron Bowl*, WASH. POST (Dec. 2, 2013), <http://www.washingtonpost.com/blogs/early-lead/wp/2013/12/02/alabama-auburn-death-threats-for-kicker-after-a-classic-iron-bowl-video/>; David Jackson, *Bush Sends Condolence Letter to Alabama Kicker*, USA TODAY (Dec. 12, 2013), <http://www.usatoday.com/story/theoval/2013/12/12/bush-alabama-cade-foster-kicker-auburn/3995969/>. Perhaps the most notorious episode involved the Alabama place kicker, Cade Foster. In a difficult loss to Auburn during the 2014 college football season, Foster missed three field goals of varying lengths. Thereafter, in an attempt to win the game, a substitute place kicker was sent in to try a last second field goal. Many remember the epic touchdown run-back of Chris Davis, the Auburn player, when the substitute kicker, Adam Griffith, missed a 57-yard field goal attempt. Alabama lost the game and Foster immediately began receiving vulgar, despicable tweets – including death threats.

While hate mail has always been around, Twitter has exponentially increased the ease with which such messages reach athletes. In fact, only 2 of the 20 student athletes [in the Professor's study] reported having their Twitter accounts private. Essentially, this means that 18 of the 20 participants have their Twitter accounts set up in a way that enables anyone who wishes to follow them to do so and, as such, have access to anything that they tweet. Unlike Facebook, where users have to agree to be friends, Twitter does not necessitate this step unless a user specifically configures the account to review follower requests. Furthermore, one does not even have to follow a person to send them a tweet. After a game, as long as an individual knows the Twitter handle of the athlete they want to contact, they can send a tweet that the athlete will likely view. As noted in the results, student-athletes are anxious to see what people are saying about the game and quickly look up their own messages but also search their names on Twitter. Thus, even if other Twitter users do not explicitly send an athlete a message, if they simply use their name in a tweet, the athlete can see it. Although some participants attributed this behavior to misguided fandom, the fact remains that student-athletes are still 18–22 years old, and the rate and content of critical tweets weighs heavily on these young minds.<sup>42</sup>

Courts should evaluate a coach's decision to limit their student-athletes' use of social media in the proper context – where distractions and student welfare should dominate over fans desired access to athletes. Coaches are hired to lead their athletes to victory in a healthy, fair and competitive manner. The question of student “rights” in the sports arena, including

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42. Browning & Sanderson, *supra* note 10, at 517.

the right to expression, is far more limited than it is, and should be, in the classroom.

#### IV. The First Amendment, Like All Amendments, Is Neither Literal Nor Absolute

The First Amendment reads in pertinent part, “Congress shall make no law . . . abridging the freedom of speech.”<sup>43</sup>

If the First Amendment were literal, the question of whether a coach – who is most assuredly not “Congress” – could regulate their student-athlete’s speech would be easily resolved. The plain language of the First Amendment speaks only to Congress, not to coaches or other public school employees.<sup>44</sup> But, the First Amendment has been interpreted far more broadly than its originally-penned eighteenth century version.<sup>45</sup> The First Amendment has been interpreted to apply to any governmental actor, federal or state, who imposes regulations on an individual’s speech. Thus, through judicial interpretation, the First Amendment has been found to apply to public school teachers and other state employees seeking to delimit a student’s speech.<sup>46</sup>

What is often lost in First Amendment discussion, including when discussing social media usage, is the truism that, “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may

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43. U.S. CONST. amend. I.

44. *Id.*

45. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”). *Gitlow*, in 1925, marked the first time that the First Amendment was deemed “incorporated” to apply equally to the states through the Fourteenth Amendment. *Id.*

46. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (giving First Amendment scrutiny to school officials’ decision to omit two stories from a high school journalism paper); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (applying First Amendment protections to school employees as state employees).

be desired.”<sup>47</sup>

Further, private regulation of speech does not implicate the First Amendment. So, while the Athletic Department of Notre Dame – a private, Catholic university – is not bound by the First Amendment, Texas A&M University and other state institutions are.<sup>48</sup> This is a vital starting place for any First Amendment discussion: no state actor, no First Amendment problem.<sup>49</sup>

This article thus provides analysis for those state universities and colleges that seek to regulate their athletes’ social media usage. When applying the First Amendment to state actors, and state universities, it is imperative to appreciate the First Amendment is not absolute.<sup>50</sup> Even if we were to read the First Amendment as it is currently interpreted to proclaim, “No state actor or employee, *including college coaches and athletic departments* shall make a rule . . . abridging the freedom of speech,” the Supreme Court’s current jurisprudence indicates that speech may indeed, at times, be abridged.<sup>51</sup>

In fact, while the Supreme Court has proclaimed that students do not shed their First Amendment rights at the

47. *Heffron v. Int’l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

48. *Hudgens v. Nat’l Labor Relations Bd.*, 424 U.S. 507, 513 (1976) (reminding, “[i]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.”).

49. *Id.* “[W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.” *Id.*

50. *Gitlow*, 268 U.S. at 666. The *Gitlow* Court reminded,

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

*Id.*

51. *Morse v. Frederick*, 551 U.S. 393, 409 (2007) (upholding a student’s suspension for refusing to put down a banner reading “BONG Hits 4 JESUS” after the student was instructed to do so by school officials).



schoolhouse gate,<sup>52</sup> it is clear that students' free speech rights are not as robust as those of other adults.<sup>53</sup> The Supreme Court permitted the potential leaking of national secrets to be printed in the Pentagon Papers case<sup>54</sup> while simultaneously prohibiting a student paper from printing stories about divorce and teenage pregnancy.<sup>55</sup> Politicians, or their surrogates, can use untoward language as they seek election but a high school student is prohibited from making a clever speech with sexual innuendos.<sup>56</sup> An adult can walk in to a courthouse wearing clothing that urges readers to "Fuck the Draft,"<sup>57</sup> while a high school student can be disciplined for wearing an American flag on Cinco de Mayo.<sup>58</sup> Religious activists can protest and hold signs at a military veteran's funeral that proclaim "God Hates Fags" for the world to see,<sup>59</sup> but a high school student can be suspended for holding a sign that says "Bong Hits 4 Jesus."<sup>60</sup>

Students may not "shed their First Amendment rights at the schoolhouse gate," but they definitely do not have the same level of First Amendment protections as their parents or other adults. The Supreme Court has found that speech rights at schools may be restricted based on the special learning-based environment of a school.<sup>61</sup> But, these cases, particularly the seminal cases, focus on primary and secondary education not

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52. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969).

53. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). *See also* Erwin Chemerinsky, *Students Do Leave Their Rights at the Schoolhouse Gates: What's Left of Tinker*, 48 *DRAKE L. REV.* 527 (2000).

54. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

55. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (upholding school's decision to censor stories on teen pregnancy and divorce from school newspaper). The Supreme Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.*

56. *See Bethel*, 478 U.S. at 682 (recognizing that the First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings.").

57. *Cohen v. California*, 403 U.S. 15, 16 (1971).

58. *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354 (9th Cir. 2014).

59. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

60. *See Morse v. Frederick*, 551 U.S. 393, 397 (2007).

61. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988).

colleges.<sup>62</sup> Hence, the precedential value of these cases may be somewhat diminished in the college setting.

Most commentators writing on the issue of college athletes' social media usage rely on *Tinker v. Des Moines* to establish that regulations can only be imposed on college students if there is proof that a substantial, material disruption of the classroom is implicated. This reliance is misplaced on two levels.

First, *Tinker* is a high school case, not a college case. And, I firmly believe that college students are qualitatively different, for First Amendment purposes, from high school students.<sup>63</sup> Protests are common on college campuses, ranging from sit-ins to rows and rows of crosses marking anti-abortion protests or yellow ribbons to honor our military personnel or other political demonstrations. Our nation's colleges represent the quintessential marketplace of ideas.<sup>64</sup> But, a college campus or college classroom is not the same as a college arena or college football field.

Second, while most other authors attempt to place the social media usage regulations under the *Tinker* paradigm, such paradigm focuses on academic issues, not athletic issues. *Tinker*'s "material disruption" standard is ill-equipped to aid courts in determining whether a particular form of speech or expression might prove counterproductive to athletic performance. *Tinker* focuses on the school's academic setting, not a campus's athletic setting. Thus, I strongly believe that any reliance on *Tinker* misses the key distinction between the

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62. See *Morse*, 551 U.S. at 393; *Hazelwood*, 484 U.S. at 273; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969).

63. See, e.g., *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (overturning, on First Amendment grounds, a journalism student's expulsion from the University for publishing a newspaper with a political cartoon of a police officer raping the Statue of Liberty and Lady Justice and for printing a story titled "Mother Fucker Acquitted" detailing the assault trial of a New York Youth who was a member of the organization "Up Against the Wall Mother Fucker.").

64. See *Healy v. James*, 408 U.S. 169, 180-81 (1972) (noting at the outset, "that state colleges and universities are not enclaves immune from the sweep of the First Amendment" and further confirming that "the college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

student-athlete as student and the student-athlete as athlete. While *Tinker* might be applicable in the college setting, an extension I am loath to embrace, *Tinker* nonetheless cannot possibly apply to an athletic setting where the goal is successful athletic performance not traditional academic instruction.

A better analytical model comes either from cases involving military personnel<sup>65</sup> or the Supreme Court's content-neutral time, place and manner line of cases.<sup>66</sup> Under either approach, the speech rights of athletes are more properly cabined within the greater athletic framework emphasizing team over individual. Because I have addressed, albeit it briefly, application of the military personnel analogy in a previous writing,<sup>67</sup> I will focus solely on the time, place and manner cases in this article.

Chief Justice Hughes first coined the phrase "time, place and manner" in *Cox v. New Hampshire* in 1941.<sup>68</sup> Since then, numerous Supreme Court cases have held that content-neutral speech regulations that primarily restrict the time, place and manner of expression, *not* the expression itself, are constitutional. The First Amendment does not prohibit limiting the location<sup>69</sup> or volume<sup>70</sup> of speech and expressive activity.<sup>71</sup> Instead, as noted in *Clark v. Community for Creative Non-Violence*:

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65. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974).

66. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

67. Mary Margaret Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limiting Student Athlete's Use of Social Media*, 1 MISS. SPORTS L. REV. 71 (2012).

68. *Cox*, 312 U.S. at 569.

69. *Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding an ordinance prohibiting picketing in front of specific residential properties); *Clark*, 468 U.S. at 288 (1984) (upholding a content-neutral regulation forbidding individuals from sleeping in symbolic tents on the National Mall and at Lafayette Park during a demonstration to generate attention for the plight of the homeless); *Adderley v. Florida*, 385 U.S. 39 (1966).

70. *Ward*, 491 U.S. at 781; *Grayned v. Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

71. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding both a 30 foot protest buffer zone and an excessive noise restriction).

Expression, whether oral or written or symbolized by conduct is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.<sup>72</sup>

The key in all time, place and manner cases is the requirement that the speech or expressive activity being regulated be content-neutral,<sup>73</sup> which ensures a regulation is "not being applied because of disagreement with the message presented."<sup>74</sup> Content-neutrality requires regulation that is trans-substantive, or that applies to all speakers regardless of the subject or message being conveyed.<sup>75</sup> In *Police Department of Chicago v. Mosley*, the Supreme Court struck down an ordinance prohibiting most picketing outside a school but excepting peaceful picketing of a school involved in a labor dispute because "[t]he . . . ordinance . . . describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited."<sup>76</sup> As Justice Marshall admonished, ". . . above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its

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72. *Clark*, 468 U.S. at 293 (citations omitted).

73. See *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). "A major criterion for a valid time, place, and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.'" *Id.* at 648 (citation omitted).

74. *Clark*, 468 U.S. at 295.

75. See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 93 (1972) (striking down ordinance that prohibited all picketing within 150 feet of a school when school is in session except "peaceful picketing of any school involved in a labor dispute.").

76. *Id.* at 95.

content.”<sup>77</sup> When regulation targets particular expression *because* of its message, content or subject matter, the regulation is not content-neutral.<sup>78</sup>

Case law suggests the delineation of three requirements to constitutionally satisfy the time, place and manner doctrine: (1) content-neutral regulation; (2) that is narrowly tailored to serve a significant government interest; and, (3) leaves ample channels of communication open to the speaker. The regulation need not be the least restrictive possible, but merely must satisfy the tripartite test announced in *Clark v. Community for Creative Non-Violence*.<sup>79</sup> In *Ward v. Rock Against Racism*, the Supreme Court explained that time, place and manner regulations are not analyzed to see if they provided the best fit, constitutionally speaking, but are assessed only to ensure they satisfy *Clark* and its progeny.<sup>80</sup> Reviewing courts need not evaluate time, place and manner regulations to ensure they are the “least intrusive means of furthering [a] legitimate governmental interest.”<sup>81</sup> Rather, the question is simply whether a particular regulation satisfies *Clark*’s three-part test of content-neutrality, whether the regulation is narrowly tailored to serve a significant government interest and whether it leaves alternative channels

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77. *Id.* (citations omitted).

78. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Court reminds:

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non-Violence, supra*, at 295. The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

*Id.*

79. *Id.* at 789-90 (reversing Second Circuit opinion because it erroneously required “the city to prove that its regulation was the least intrusive means of furthering its legitimate governmental interests. . . .”).

80. *Id.* at 791.

81. *Id.* at 789-90.

of communication open to the speaker.<sup>82</sup>

One of the better case presentations analyzing *Clark's* three-part formula occurs in *Ward v. Rock Against Racism*.<sup>83</sup> Justice Kennedy, writing for the majority, separates each of the three elements for discussion into distinct sections.<sup>84</sup> In doing so, Justice Kennedy provides a clear roadmap for legislatures and litigants alike to evaluate the constitutionality of speech regulations. This roadmap convinces this author that reviewing courts will likely find coaches and athletic departments' regulation of their athletes' social media accounts constitutional.

### A. Content Neutrality

Unlike many scholars in this area, this author believes that the season-long wholesale ban is far more likely to satisfy First Amendment scrutiny than those regulations that target particular words, phrases or topics. The season-long bans, those regulations requiring athletes to sign off of their Twitter or Facebook accounts during their competitive season, are content-neutral. NO communications may be posted, regardless of content. NO messages may be sent, regardless of topic. A ban, while seemingly more oppressive than a simple listing and policing of the prohibited "seven dirty words,"<sup>85</sup> never considers the propriety or acceptability of the speech.<sup>86</sup> All speech is

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82. *Id.* at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

83. *Id.* at 791-803.

84. *Id.*

85. *Cf. FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (memorializing comedian George Carlin's monologue the seven words you could not say on the airways: "shit, piss, fuck, cunt, cocksucker, motherfucker and tits"). Two other authors participating in this Symposium have listed several words that are prohibited by universities and colleges when their athletes participate in social media dialogue. Ironically, once the state chooses a particular word, i.e. "fuck," or a particularly category, i.e. "curse words," the state is engaging in content-based prohibitions that receive the highest level and most searching from of constitutional scrutiny from courts. These "seven dirty words" prohibitions are far more likely to be found unconstitutional than an outright ban moderated by time, place and manner regulations.

86. *See, e.g., Jimmy Sanderson, To Tweet or Not to Tweet: Exploring Division I Athletic Departments' Social-Media Policies*, 4 INT'L J. SPORTS COMM.

equally prohibited regardless of whether it involves self-promotion, sexually graphic materials, cursing, injury updates, team strategies or devotions. A ban, by its very nature, is content-neutral.<sup>87</sup>

In contrast, once the state begins choosing acceptable verbiage or expression, reviewing courts will ordinarily review such regulations under the highest, most arduous form of constitutional review, strict scrutiny. As the Supreme Court reminded in *Cohen v. California*:

[T]he principle [of restricting offensive words] contended for by the State seems inherently boundless. How is one to distinguish [these words] from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless true that one man's vulgarity is another's lyric.<sup>88</sup>

*Cohen* required the state to provide a "compelling" reason to prohibit an individual from wearing a jacket bearing the phrase "Fuck the Draft."<sup>89</sup> Legislation need only satisfy a "compelling"

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492, 500-02 (2011).

87. See *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral — indeed it is silent — concerning any speaker's point of view . . .").

88. *Cohen v. California*, 403 U.S. 15, 25 (1971).

89. *Id.* at 16, 26. "[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense." *Id.* at 26.

governmental interest when the Court invokes its highest level of constitutional review, strict scrutiny. Strict scrutiny generally results in a regulation being struck down because unlike time, place and manner restrictions, strict scrutiny requires proof that the regulation leaves no less restrictive means available to accomplish the government interest.<sup>90</sup> As set forth above, the “no less restrictive means” test does not apply in a time, place and manner evaluation.

Thus, while many scholars celebrate schools’ use of prohibited words and call for educating student-athletes as to “appropriate” behavior on social media, such content-based approach strikes at the heart of the First Amendment. Instead, using a time, place and manner analysis, the far more likely constitutionally permissible approach is a content-neutral season long ban. No one is on social media during the season . . . period.

Using Justice Kennedy’s paradigm in *Ward*, a state university’s main reason for imposing a season-long ban during an athlete’s competitive season is to ensure that the athlete remains focused on successful athletic performance.<sup>91</sup> Much like the volume and noise complaints at issue in *Ward*, “[t]his justification for the guideline ‘ha[s] nothing to do with content,’ and it satisfies the requirement that time, place, or manner regulations be content-neutral.”<sup>92</sup> State universities imposing season-long bans do not delimit what words, what subjects, or what topics are permissible. The universities, or their coaches and athletic departments, are limiting wholesale distractions, not just phrases or themes. Instead, in order to maintain the team and athletes’ focus on the primary activity of athletic competition, social media is proscribed during the competitive season.

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90. *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90, 797-99 (1989).

91. *Id.* at 792.

92. *Id.*



*B. Narrowly Tailored to Serve a Significant Government Interest*

Once a regulation satisfies the content-neutral requirement, there must be a demonstration of a narrow tailoring (or fit) to serve a significant governmental interest.<sup>93</sup> This really requires two assessments – the first being some effort to properly tailor or shape the regulation so as to not overly impact speech and, second, proof of a significant governmental interest.

In the athletic context, as set forth above, the significant government interest is to focus on the goal of athletics: successful athletic performance. Universities field athletic teams to promote competition and athletic success. Thus, it appears that keeping 18- to 23-year-old student-athletes focused on the task at hand, their athletic contests, would satisfy the significant governmental interest. This would be particularly true for those student-athletes receiving athletic scholarships. Those on athletic scholarships are literally being given governmental resources (money) in exchange for focusing at least part of their attention on contributing their time and effort to successful athletic performance.

All student-athletes, however, are government supported individuals, as even those not on athletic scholarship receive the benefit of travel, tutors, enhanced training and medical care, athletic instruction, clothing, equipment and other athletic gear. The student-athlete, while not likely a state employee, nonetheless is an individual representing the university.<sup>94</sup> And, these individuals are tasked with furthering the state interest in fielding a successful athletic team on behalf of the university. The university, accordingly, should be permitted to justify their action based on the significant government interest of encouraging successful athletic performance.

The governmental interest upheld in *Ward* was protecting citizens and visitors to Central Park from unwelcome noise.<sup>95</sup> Here, the governmental interest is keeping athletes focused on

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93. *Id.* at 796.

94. *Cf. Marcum v. Dahl*, 658 F.2d 731, 734-35 (10th Cir. 1981).

95. *Ward*, 491 U.S. at 796.

athletics, competition and performance. While this interest may sound trite, states benefit from fielding successful athletic teams.<sup>96</sup> State universities with efficacious athletic programs often see their national academic ranking heightened, their applications increase, their admissions become more competitive and their alumni support increased.<sup>97</sup> More attention from athletic prowess, both in the nature of academic ranking and with alumni, tends to mean more community support – be it financial or otherwise, localized or national. More support lends itself to furthering the broader university mission of educating the state’s citizenry. Thus, athletics, ultimately further the state’s interest in education.

Once a significant government interest is demonstrated, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that

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96. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* 3 (Nat'l. Bureau of Econ. Research, Working Paper No. 18196, 2012), available at <http://www.nber.org/papers/w18196> (finding “robust evidence that football success increases athletic donations, increases the number of applicants, lowers a school’s acceptance rate, increases enrollment of in-state students, increases the average SAT score of incoming classes, and enhances a school’s academic reputation.”).

97. *Id.* at 24. These gains are not merely “reputational” but also directly impact the university and its educational mission. Professor Anderson found:

For FBS schools, winning football games increases alumni athletic donations, enhances a school’s academic reputation, increases the number of applicants and in-state students, reduces acceptance rates, and raises average incoming SAT scores. The estimates imply that large increases in team performance can have economically significant effects, particularly in the area of athletic donations. Consider a school that improves its season wins by 5 games (the approximate difference between a 25th percentile season and a 75th percentile season). Changes of this magnitude occur approximately 8% of the time over a one-year period and 13% of the time over a two-year period. This school may expect alumni athletic donations to increase by \$682,000 (28%), applications to increase by 677 (5%), the acceptance rate to drop by 1.5 percentage points (2%), in-state enrollment to increase by 76 students (3%), and incoming 25th percentile SAT scores to increase by 9 points (1%).

*Id.*

would be achieved less effectively absent the regulation.”<sup>98</sup> State universities will be put to the test that without the regulation, or season-long social media ban, keeping a team focused on athletic performance is more difficult. This does not require empirical evidence or identical treatment of every program. It is not a “but-for” or “least restrictive means” test.<sup>99</sup> Rather, courts tend to give deference to state actors to deal with a problem (team and individual distractions) with sufficient latitude to determine whether there is a need to act and, if so, to assess those actions for reasonable fit, not absolute precision.<sup>100</sup>

To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. See *Frisby v. Schultz*, 487 U. S., at 485 (“A complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil”). So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative. “The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests” or the degree to which those interests

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98. *Ward*, 491 U.S. at 799.

99. *Id.* at 798 (“Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”).

100. *Id.* at 799-800.

should be promoted. *United States v. Albertini*, 472 U.S. at 689; see *Community for Creative Non-Violence, supra*, at 299.<sup>101</sup>

Thus, a complete ban — particularly when that ban is temporarily imposed to apply only during the competitive season — should pass constitutional scrutiny. The reason that a ban, as opposed to a more limited regulation targeting words or actions, is necessary is two-fold: first, states may not pick and choose proper discourse, words or conduct, without violating the requirement of content-neutrality, and, second, only in eradicating, entirely, the distractions posed by social media will a team and its athletes be able to keep their focus on the court or the field. Social media presents a significant distraction from successful athletic performance and a temporary ban during the competitive season provides a constitutionally effective way to curtail the distraction.

As the Supreme Court found in *Frisby v. Schultz*:

A statute is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 808-810, 104 S.Ct. 2118, 2130-2132, 80 L.Ed.2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because “the substantive evil — visual blight — [was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself.”

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101. *Id.*

*Id.*, at 810, 104 S. Ct. at 2131.<sup>102</sup>

Imposing social media bans on student-athletes assures that the athletes will not be improperly distracted, consumed with virtual “socializing,” perpetually updating their status or otherwise influenced in a manner that undermines team unity and athletic performance. The “evil” to be remedied is distraction from “friends” and “followers” that undermine teamwork and team performance. Social media usage presents a broad and pervasive problem, much like visual clutter and blight. Constitutionally, athletic departments are prohibited from picking and choosing the messages or friends that an athlete may communicate with but they are within their constitutional power to delimit an athlete’s time spent on social media just as they are permitted to control their athletes’ behavior through curfews and other team-imposed rules. Nearly identical to the situation in *City Council of Los Angeles v. Taxpayers for Vincent*, athletic departments are prohibited from giving support to particular messages or viewpoints without undermining the distraction posed by all social media.<sup>103</sup>

Social media bans are analogous to the noise control issues facing the Court in *Ward*. There, Justice Kennedy observed:

It is undeniable that the city’s substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city’s sound technician control the mixing board during performances. Absent this requirement, the city’s interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent’s past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. See *Community for*

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102. *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988).

103. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

*Creative Non-Violence, supra*, at 299. The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.<sup>104</sup>

To compare *Ward* to an athletic department's regulation of its student-athletes would read as follows: It is undeniable that a university's interest in keeping athletes focused on their athletic contests is served in a direct and effective way by banning their use of social media during the competitive season. Absent this requirement, athletes are likely to be distracted by continually focusing on social media, checking and updating their profiles, communicating with fans and critics alike, and dealing with criticism of their play that could impact team chemistry or their own individual confidence and performance. The alternative methods proffered by those desiring greater access to, or perhaps for, student-athletes is nothing but second guessing of a coach or athletic department's assessment of team chemistry and student welfare. Season-long bans generally last three to five months and ensure that a student-athlete keeps their focus on why they are part of an athletic team and department: to successfully represent the institution in athletic contests.

### C. *Alternative Channels of Communication Remain Open*

The final requirement under time, place and manner analysis is that alternative channels of communication remain open.<sup>105</sup> The reported bans of social media have focused on Twitter, Facebook and other social media outlets that encourage virtual "friends" and "followers." These virtual worlds, a modern invention, help disseminate communications – they are not communications in any intrinsic manner. Most of the twentieth century witnessed interaction between athletes and true friends

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104. *Ward*, 491 U.S. at 800.

105. *Frisby*, 487 U.S. at 483.

and followers using email, cellphones, text messaging and other traditional methods of communication. Modern technology has perhaps curbed these traditional forms of communication for our youth, but direct communication is far from passé and provides protections that virtual communications do not. Chief among the distinctions between direct and virtual communications is that direct communication requires a person to actually communicate precisely – with a known number, address or person – versus sending an indirect communication out to a virtual world where the recipient may be known or unknown.

The critical feature of a season-long social media ban is that these bans still permit “the more general dissemination of a message.”<sup>106</sup> Student-athletes are not prohibited from communicating with individuals – even fans – under the current social media proscriptions. There are many, many methods for these individuals to continue speaking and expressing themselves in a myriad of ways outside social media. Athletes may call individuals. They may appear at press conferences to self-promote or further showcase their talents. They may use email or text-messaging. Many benefit from television exposure. They may even use placards or signs or billboards. The current social media bans merely foreclose, for a short period, one technique of communication but do not preclude the dissemination of messages generally.

The advantage of direct communication or direct media over social media is that individuals relying on direct media can be more sure of who they are actually communicating with. Further, direct communication makes it far more likely that a student-athlete will limit their time and exposure with direct media, eliminating a key component of the distractions coaches seek to eliminate. Social media, as two professors note, is empirically demonstrated to capture far more of an individual’s time than telephone calls or other communication techniques.<sup>107</sup>

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106. *Id.*

107. See Browning & Sanderson, *supra* note 10, at 509 (“Participants reported checking Twitter frequently throughout the day, ranging from 20 to hundreds of times each day.”). If students are obsessed with their social media presence, chances are likely they are less “present” for other activities, not the least of which includes all team and sport activities required from the student athlete.

If coaches must deal with athletes that are reflexively, if not obsessively, checking their social media status for updates via their cellphones throughout team meetings, team meals, practices, team travel and even games, there is a high likelihood for distraction coupled with a lessened opportunity to develop proper team chemistry.

Direct communication requires focus and direction, i.e. dialing a particular number, texting a particular person or writing to a particular email address. For student-athletes, a world without constant social media updates would require talking to your teammates, focusing on school during study hall and eliminating the divisive nature of competing for virtual “friends” and “followers.” Unlike social media, to reach hundreds or thousands of individuals at once, a person using direct communication would have to make hundreds of phone calls or send hundreds of emails. Direct communication, by its very nature, limits the potential distraction and audience. But, in no way does requiring direct communication eliminate, or even lessen, the message.

In contrast, social media can be all-consuming and distracting, opening individuals up to communications from individuals posing as “friends” and “followers” whose main goal – particularly with student-athletes – is to harass, harangue, stalk or befriend individuals who they would otherwise never have contact with. Social media allows an individual to send something out into a virtual world that can literally reach thousands of people simultaneously, with those people being known or unknown, in fact potentially unknowable, by the sender. Social media poses a much higher risk to student-welfare based on the fact that student-athletes are highly visible, highly impressionable and extremely vulnerable to fans and critics’ postings. Finally, because students can become obsessed with watching their social media profiles grow and proliferate, social media is highly distracting, particularly for the young athlete that seeks self-promotion and attention.

Provided athletic departments do not foreclose direct communications, particularly those with known friends and family members such as text messaging, cellphones, Facetime and other forms of general communication, the season-long bans



proscribing Twitter and Facebook should satisfy the final time, place and manner requirement.<sup>108</sup> The risk posed by social media is largely due to the unknown audience and unknown “friends” and “followers” that begin to communicate with the student-athlete. These communications are qualitatively distinct from direct communications with actual friends and known acquaintances.

Coaches that impose season-long bans are not shutting down an athlete’s ability to communicate with his or her larger audience.<sup>109</sup> Instead, the coach is taking steps to ensure that the student-athlete is protected from the mischiefs attendant to social media, the harassment endured by many college athletes on social media and the high level of distraction that these self-focused forms of communication entail. Coaches have valid reasons for wanting to keep their athletes’ mind focused on the court or field rather than the number of “friends” and “followers” they have assembled. Coaches have similarly appropriate reasons to keep their athletes focused on team rather than individual.

Time, place and manner regulations merely require that ample channels of communication remain open to the speaker. Leaving ample channels open does not require identical channels remain open.<sup>110</sup> The key in time, place and manner, is to ensure that a speaker can still spread his or her message – not that the volume, impact or audience for the speaker remain the same. For these reasons, season-long bans that permit direct communications will likely pass constitutional muster.

#### V. Coaches Can Constitutionally Admonish Their Athletes, “Shut It Off and Play”

Fans want unfettered access to their favorite players. I understand this. I fully appreciate this. But, wanting to learn what our favorite athletes are doing, thinking or having the ability to send them notes of support or criticism is not

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108. *Frisby*, 487 U.S. at 483-84.

109. *Id.*

110. *Id.*

something that is constitutionally mandated. Rather, coaches retain the right to regulate their athletes' usage of social media under proper content-neutral time, place and manner restrictions. Prohibiting an athlete from using Facebook does not preclude them from sending a text message to a friend or relative or a known fan. Proscribing an athlete from utilizing Twitter during the season, pre-season or any time before or after competition does not exclude them from calling individuals to discuss their performance or lament a tough loss. In each instance where social media usage has been foreclosed, other options for communication – often options that require some familiarity with the individual – remain available to the athlete. What these policies tend to limit are simply the communications that get sent everywhere, to everyone that remain forever available on the internet to haunt a player and his or her university and athletic department. Rather than exist in a virtual world where someone may never meet their “friends” and “followers,” coaches retain the power to limit their players' interactions to known individuals. Players live in a world that is hypersensitive and hypercritical to the athlete's every move and coaches retain the power to limit those interactions. The First Amendment poses no impediment.

The coach's non-speech reasoning for such regulations is simple: successful athletic performance. The goal of athletics is to win. Coaches owe their players and the colleges for which they coach the duty to field the most competitive team they can ethically and athletically field. If a coach were to regulate speech and advise a player to “shut it off”, that might be a speech-based regulation. But, even in those instances where it appears the coach is striving to limit the information their athletes post or tweet, the reality is that the coach is seeking to minimize distractions to athletic performance, not regulate the content of their athletes' speech. It is not that coaches want their athletes not to talk. Rather, the truth remains that coaches want, actually need, their athletes to focus – focus on team, focus on performance and focus on winning.

Supreme Court precedent permits reasonable time, place and manner regulations provided those regulations are content-neutral (here, the regulations are generally complete bans from

certain, but not all, social media formats), not intended to curtail speech or expression (here, the goal is on improving athletic performance) and retain other comparative avenues for speech or expression (here, cell phones, email and other social media with known users). The current regulations imposed by some Division I coaches appear to be constitutionally acceptable. These regulations aid coaches in protecting their athletes from outside distractions and unknown detractors whose communications can impact athletic performance and outcome.

But, good law does not always make good policy. The fact that coaches, athletic departments and colleges may legally be entitled to regulate their student athletes' social media usage does not automatically suggest they should. We live in a decidedly modern world where 24/7 news and entertainment access shapes our cultural experience. This author believes that each coach, each athletic program has the legal authority to choose for itself and its athletes the best course regarding social media. What may be good for Texas A&M may not work as well at Kansas. And, under existing First Amendment precedent it appears that the best course is to be charted individually by each school. Social media regulations absolutely implicate the First Amendment. But, as demonstrated above, implicating the First Amendment is not the same as violating the First Amendment. Despite fans' desire to have unfettered access to their favorite college athletes via social media, such access is not constitutionally mandated. Successful athletic performance, not social interaction with "friends" and "followers," is the goal of athletics. My belief, my hope, is that the courts will both recognize and support this goal in line with past precedent.

The First Amendment literally permits coaches to instruct their athletes to "shut it off and play." Whether they choose to do so is an entirely different matter that, like so many other choices, is best decided between coach and player.<sup>111</sup>

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111. A great example of how the issue of banning or permitting Twitter remains a policy decision is the decision by Coach Chris Peterson, the new University of Washington head football coach, to allow his football players at UW to use social media despite having been one of the first college coaches to ban social media while at Boise State. Taylor Soper, *New UW Football Coach Lifts Twitter Ban for Players*, GEEKWIRE (Apr. 19, 2014), <http://www.geekwire.com/2014/chris-petersen-huskies-social-media/>.